

Leveling the Playing Field: Increased Protection for NCAA Student-Athletes via Collective Bargaining

By

David M. Klevorn

Submitted in partial fulfillment of the requirements of the

King Scholar Program

Michigan State University College of Law

Under the direction of

Professor Mary Bedikian

Spring, 2015

Strong, responsible unions are essential to industrial fair play. Without them the labor bargain is wholly one-sided. The parties to the labor contract must be nearly equal in strength if justice is to be worked out, and this means that the workers must be organized and that their organizations must be recognized by employers as a condition precedent to industrial peace.

—Supreme Court Justice Louis Brandeis

I. Introduction

The National Collegiate Athletic Association (“NCAA”) is currently at a crossroads. It is a multibillion dollar industry, but maintains it is an amateur sport. Characterizing the NCAA model as an amateur sport while it reaps millions of dollars in profit annually presents a strange dichotomy. The CBS/Turner contract in the 2014 NCAA Men’s Basketball tournament was valued at \$700 million,¹ but that tournament’s most outstanding player, Shabazz Napier, said there are nights he goes to bed hungry because his grant-in-aid scholarship meal plan does not sustain him with even the most basic of life’s necessities – food.² Mr. Napier and countless other student-athletes who generate revenue for their schools operate under an arcane paternalistic arrangement where their working conditions are dictated exclusively by the institutions they attend. Characterizing these student-athletes as employees is not only a more accurate reflection of their role within a school, but it will provide these young athletes with the freedom to engage in collective bargaining and achieve a more equitable playing field.

College athletics have drastically changed over the past few decades to the point where student-athletes hardly resemble students at all anymore. Rather, they are participants in a mega industry that brings in enormous revenues, but only allocates a miniscule fraction to the grant-in-

¹Mark Alesia, *NCAA approaching \$1 billion per year amid challenges by players*, The Indianapolis Star, (March 27, 2014), <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/>

²Scott Phillips, *Shabazz Napier: ‘there are hungry nights that I go to bed and I’m starving’* (April 7, 2014) <http://collegebasketballtalk.nbcsports.com/2014/04/07/shabazz-napier-there-are-hungry-nights-that-i-go-to-bed-and-im-starving/>

aid scholarships for the student-athletes. In light of this and the extensive control exerted over them, student-athletes more closely resemble employees, and therefore should be afforded protections and rights inherent in an employment relationship. Based on recent trends, the NCAA appears to be feeling the pressure of a changing landscape.

In section II of my paper I will discuss the general background and issues at play under the current NCAA model. In section III, I will advocate that college athletes in revenue producing sports ought to be considered employees under the law – the pivotal conclusion reached in the *Northwestern* decision that the full Board ought to affirm upon review. I will discuss in section IV what the possible ramifications of the *Northwestern* decision are, and before concluding, I will discuss alternatives to collective bargaining in section V, and what the future of the relationship between the NCAA and student-athletes may be.

II. Background Facts and Issues Currently Facing the NCAA

On January 28, 2014, Northwestern University football players for the first time in the history of college sports filed a petition for an election with the National Labor Relations Board (“NLRB”), indicating they were interested in unionization. Remarkably, in a decision that has sparked intense debate, the NLRB Regional Director for Region 13 found that Northwestern University student-athlete football players who received grant-in-aid scholarships are “employees” under the meaning of the National Labor Relations Act (“NLRA”).³ For many, the Board’s decision was long overdue – an essential step towards to leveling a playing field that has

³ Northwestern Univ., N.L.R.B. No. 13-RC-121359, at 2 (Mar. 26, 2014) (decision finding that players receiving scholarships are employees and ordering election within the bargaining unit) [hereinafter the “*Northwestern case*”]. The National Labor Relations Board has since agreed to review the Regional Director's decision and has invited interested parties to file amicus briefs to inform its decision. Northwestern Univ., N.L.R.B. No. 13-RC-121359 (Apr. 24, 2014) (order granting Northwestern's request for review of the decision); Northwestern Univ., N.L.R.B. No. 13-RC-121359 (May 12, 2014).

historically benefitted only one side of the ledger sheet. For others, the Board's decision marked the beginning of the end of college sports.

Current NCAA president, Mark Emmert, states, "To be perfectly frank, the notion of using a union employee model to address the challenges that do exist in intercollegiate athletics is something that strikes most people as a grossly inappropriate solution to the problems. It would blow up everything about the collegiate model of athletics."⁴

Perhaps the NCAA model should be thoroughly overhauled, especially when people like Emmert are earning annual salaries in excess of \$1.7 million and the student-athletes who serve as the foundation of the NCAA model are unable to share a cent.⁵ Even more egregious than the inability of student-athletes to tap into the revenue they generate for their respective schools is the fact that many are denied even the most fundamental of protections.

Indeed, there is something grossly unfair in the notion that billions of dollars are made primarily because of the performances and hard work of student-athletes, and yet they can only receive limited grant-in-aid scholarships that do not fully cover the cost of living and can be terminated on a whim by the universities due to injuries or poor performances. Furthermore, many student-athletes are unable to take advantage of the education their scholarship covers due to their responsibilities in their respective sports.

All-Pro NFL cornerback and former Stanford University graduate, Richard Sherman once commented on the life of a student-athlete and said, "People think, 'Oh, you're on scholarship.'

⁴Tom Fornelli, *NCAA president Mark Emmert against NCAA union*, (April 6, 2014), <http://www.cbssports.com/collegefootball/eye-on-college-football/24517018/ncaa-president-emmert-against-ncaa-union>

⁵Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's 'No Pay' Rules Violate Section One of the Sherman Act*, Case Western Reserve Law Review, Volume 64, Issue 1 (Fall 2013).

They pay for your room and board, they pay for your education, but to their knowledge, you're there to play football. You're not on scholarship for school and it sounds crazy when a student-athlete says that, but... coaches tell them every day: 'You're not on scholarship for school.'”⁶ This encapsulates the most dramatic holding of the *Northwestern* case –student-athletes are not primarily students.⁷

Some have even gone as far as calling for a complete reevaluation of the amateur model of the NCAA, so that student-athletes can profit off their athletic abilities and be compensated according to their fair market value for their abilities and likeness.⁸ However, while people like Mark Edelman claim the NCAA’s current principles of amateurism violate the Sherman Antitrust Act and demand compensation including wages, student-athletes like Kain Colter and the other Northwestern University football players who filed a petition to be recognized as employees for collective bargaining purposes have a much simpler goal in mind than the demolition of the amateurism model and the ability to earn compensation; they seek basic protections and rights such as medical benefits for the inevitable injuries that accompany intense collegiate athletic competitions and the ability to meet their basic costs of living.⁹

In Colter’s words, “The action we're taking isn't because of any mistreatment by Northwestern... We love Northwestern. The school is just playing by the rules of their governing body, the NCAA. We're interested in trying to help all players – at USC, Stanford, Oklahoma State, everywhere. It's about protecting them and future generations to come... Right now the

⁶ Jerry Hinnen, *Seahawks' Richard Sherman, Michael Bennett blast NCAA*, (January 30, 2015) <http://www.cbssports.com/collegefootball/eye-on-college-football/25009747/seahawks-richard-sherman-michael-bennett-blast-ncaa>

⁷ Northwestern Univ., N.L.R.B. No. 13-RC-121359, at 18.

⁸ Marc Edelman, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. Mich. J.L. Reform 861 (2002).

⁹ Mike Wise, *Kain Colter’s unionization effort is fueled by compassion, common sense*, The Washington Post (April 12, 2014), available at http://www.washingtonpost.com/sports/colleges/mike-wise-kain-colters-unionization-effort-is-fueled-by-compassion-common-sense/2014/04/12/0053300e-c285-11e3-bcec-b71ee10e9bc3_story.html

NCAA is like a dictatorship. No one represents us in negotiations. The only way things are going to change is if players have a union.”¹⁰ Kolter’s comments strike at the heart of what collective bargaining seeks to do – provide a voice to the underrepresented and underpowered to ensure fairer treatment.

III. College Athletes in Revenue Producing Sports Are Employees

The holding of the *Northwestern* decision was quite simple; football players receiving scholarships from Northwestern University are “employees” under section 2(3) of the National Labor Relations Act, and are therefore allowed to conduct an election under the Regional Director for an appropriate bargaining unit.¹¹ Given the potential ramifications of *Northwestern*, a closer look at its facts, holding, and reasoning is warranted.

The case centers on the College Athletes Players Association (CAPA) and student-athletes including former quarterback Kain Colter asserting that Northwestern University football players receiving grant-in-aid scholarships from the University are “employees” under the meaning of the Labor Relations Act.¹² Northwestern University is the “employer” as a private, non-profit, non-sectarian university chartered by the State of Illinois. Northwestern is a member of the NCAA, and 500 of its 8,400 students participate in a varsity athletic sports.¹³ The Northwestern football team has 112 players, including 85 receiving scholarships.¹⁴ These scholarships are around \$61,000 each academic year in total compensation, including tuition,

¹⁰ Tom Farrey, *Kain Colter starts union movement*, ESPN (January 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union

¹¹ *Northwestern*, at 2

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 3.

room, and board.¹⁵ During players' first two years on campus, they live in the dorm rooms, and the scholarships cover the dorm costs and a meal card.¹⁶ In contrast, the players who are upperclassmen can elect to live off campus, and scholarship players are provided a monthly stipend totaling between \$1,200 and \$1,600 to cover their living expenses,¹⁷ which is just above the poverty line.¹⁸

The National College Player Association and Drexel University Department of Sport Management conducted a joint study, which shockingly revealed that the average "full ride" scholarship fails to cover approximately \$3222 of necessary cost of living expenses per student-athlete in 2010-11, requiring the athletes to cover the difference out of their personal pockets.¹⁹ Furthermore, the room and board provisions in a full scholarship leave 85% of players living on campus and 86% of players living off campus living below the federal poverty line.²⁰

Despite their sports and schools failing to adequately provide for them, student-athletes still commit an extensive amount of time and energy to their sports. In the *Northwestern* case, the athletes committed a minimum fifty to sixty hours each week for football related activities during training camp,²¹ and forty to fifty hours each week outside of training camp in addition to their educational demands each week.²² Technically, the NCAA rules are supposed to limit the countable athletically related activities to four hours per day, but certain activities such as travel, training meetings, "voluntary" weight training and strength conditioning, and training tape

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Massachusetts Law Reform Institute, Inc., *Federal Poverty Guidelines – 2015*, Massachusetts Legal Services (January 21, 2015) <http://www.masslegalservices.org/content/federal-poverty-guidelines-2015>

¹⁹ Huma, R., & Staurowsky, E. J. (2012). *The \$6 billion heist: Robbing college athletes under the guise of amateurism*. A report collaboratively produced by the National College Players Association and Drexel University Sport Management. Available online at <http://www.ncpanow.org>

²⁰ *Id.*

²¹ *Northwestern*, at 3.

²² *Id.* at 6.

review do not constitute countable athletically related activities according to the NCAA rules.²³ Therefore, student-athletes consistently must perform well over what would constitute a full-time, forty hour a week job for a non-student-athlete.

The players are also subject to special team and athletic department rules not applicable to the general student body, including restrictions on their social media activities, a prohibition on swearing in public, and a requirement of mandatory study halls.²⁴ These factors are important for showing the players are under the control of the university, and distinguishing their scholarships from the financial aid the general student body receives.

Indeed, as the NLRB observed, “the record makes it clear that [Northwestern’s] scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school”²⁵ Many schools have wide gaps between the average GPAs and SAT scores of their student-athletes and their general student body.²⁶ Kain Colter testified he had hoped to go to medical school after his time playing football at Northwestern, but when he attempted to take a required chemistry course his sophomore year, his coaches and advisors discouraged him from taking it because it conflicted with morning football practices.²⁷ Colter’s story is not unique, as sports related activities almost always trump academic activities for student-athletes.

As discussed previously, the financial disparity between what student-athletes are given and what revenues the student-athletes help bring in is astounding. Northwestern University’s

²³ *Id.* at 6.

²⁴ *Id.* at 4.

²⁵ *Id.* at 9.

²⁶ Alison Go, Athletes Show Huge Gaps in SAT Scores, (December 30, 2008)

<http://www.usnews.com/education/blogs/paper-trail/2008/12/30/athletes-show-huge-gaps-in-sat-scores> (stating that “Football players average 220 points lower on the SAT than their classmates. Men's basketball was 227 points lower.”)

²⁷ *Northwestern*, at 11.

football team generated \$30.1 million in gross revenue and \$8.4 million in net profit in 2012-2013.²⁸ Northwestern has 112 football players, 85 of whom receive scholarship money totaling approximately \$61,000 annually, or \$5.185 million in aggregate.²⁹

The central issue at play in *Northwestern* is whether football players can be considered “employees” under section 2(3) of the National Labor Relations Act. The aforementioned section provides:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.³⁰

The above is a broad definition of an employee, and the plain language of the statute makes it clear that student-athletes are not among some of the few articulated exceptions that cannot be considered employees. The U.S. Supreme Court has held it is necessary to consider the common law definition of an “employee” in the application of this broad definition.³¹ The Supreme Court’s opinion in *NLRB v. Town & Country Electric* is highly influential, as it holds that the common law defines an employee as a person who (1) performs services for another under a contract of hire, (2) subject to the other’s control or right of control, and (3) in return for payment.³² If these three requirements can be proven, then grant-in-aid scholarship student-athletes can prevail in the pending review of the Regional Director’s decision by the NLRB, and

²⁸ *Id.* at 13.

²⁹ *Id.* at 3.

³⁰ 29 USC § 152(3)

³¹ *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995).

³² *Brown University*, 342 NLRB 483, 40, fn. 27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. 85 at 94)

student-athletes everywhere would be one step closer to finally attaining a seat at the bargaining table with the NCAA. However, in addition to satisfying the above common law test for what an employee is, employees in a university setting must also satisfy a statutory test and demonstrate they are not “primarily students.”³³ This additional test may prove problematic for student-athletes in non-revenue producing sports to assert their relationship to the school is primarily a commercial and economic one, so they ought to be considered employees as well.

1) Student-Athletes Perform Services for their Schools under a Contract of Hire

The first prong of the common law definition of an employee that must be satisfied is showing the student-athletes perform services for their schools under a contract of hire. This requirement appears to be satisfied in the student-athlete context because the Regional Director in *Northwestern* found the football players clearly perform valuable services for the school.³⁴ Because it is so readily apparent the student-athletes perform valuable services for the schools, it is unlikely this prong will be a seriously contested factor in future unionization debates or the pending review of the Regional Director’s decision.

Although it was not discussed at length in the *Northwestern* case, the Regional Director also had to find the “tender” that players are required to sign before the beginning period of each scholarship constituted the requisite contract of hire. One of the pivotal issues in determining whether the Regional Director’s decision will stand on review by the full Board is whether this tender can properly be considered a contract of hire.

A case that supports an employer-employee relationship despite a lack of a formal employment contract for hire is *Seattle Opera v. NLRB* where supplemental choir members of

³³ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete; the College Athlete as Employee*, 81 Wash. L. Rev. 71, 92-93 (2006).

³⁴ *Northwestern*, at 14.

the Seattle Opera were found to be an appropriate collective bargaining unit.³⁵ Although not working under any particular employment contract, the choristers were required to sign letters of understanding and intent agreeing to adhere to the attendance and decorum requirements spelled out in a handbook provided by the opera.³⁶ This case suggests a contract of hire can be a variety of things; it can be express or implied, oral or written, so long as the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.³⁷ There is a strong argument that the tender signed by student-athletes should serve as an employment contract of hire, as it lays out the conditions that must be followed for their scholarship, and the extensive team and athletic department rules also demonstrate the extent of control a school has over a student-athlete.

The case that the NCAA will hope the full NLRB finds most persuasive is *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO, Petitioner*, 342 NLRB 483 (2004).³⁸ In *Brown University*, the Petitioner contended that the petitioned-for Teaching Assistants, Research Assistants, and proctors were employees within the meaning of Section 2(3) and that they constituted an appropriate unit for collective bargaining.³⁹

The Board in *Brown University* determined that graduate student assistants were admitted into, not hired by, a university.⁴⁰ Specifically, in footnote 27, the Board stated,

³⁵ 292 F.3d 757

³⁶ *Id.* at 765.

³⁷ *Id.* at 762 (citing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85)

³⁸ *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO, Petitioner*, 342 NLRB 483 (2004).³⁸

³⁹ *Id.* at 483.

⁴⁰ *Id.* at 490.

Here, graduate student assistants are not “hired” to serve as graduate teaching or research assistants. They are admitted to a graduate program that includes a requirement for service as a graduate student assistant. The teaching and research are not performed “for” the university, as such, but rather as an integral part of the student's educational course of study. The financial arrangements for graduate student stipends further confirm the fundamentally educational nature of service as a TA or RA, as the stipends are based upon status--enrollment in a graduate program. They do not depend on the nature or value of the services provided, and, thus, are not a quid pro quo for services rendered.

It certainly could be argued that football players are in a similar situation, where they should not be considered “hired” to serve as football players, but rather admitted to the schools under a football scholarship that requires them to play football. This is likely going to be a highly debated and closely decided portion of the full Board’s review, but the reasoning of the Regional Director was sound in finding the statutory test inapplicable in the case “because the football-related duties are unrelated to their academic studies, unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements...”⁴¹ Thus, *Brown University* essentially means that students who work for their universities in an educational and noneconomic context are not employees; however, it should be readily apparent that the situation of student-athletes is quite distinguishable from that of graduate assistant students.⁴²

One of the primary contentions of the alleged employer school in *Brown University* was that the graduate students could not be considered employees because “the relationship between

⁴¹ *Northwestern*, at 18.

⁴² McCormick, at 95-96. “when the students' efforts are predominantly academic and not economic, then those individuals are not employees within the meaning of the Act. Conversely, when a student who works for his university performs services that are not primarily educational or academic and his relationship to the university with respect to those services is an economic one, then the student may be an employee under the Act, provided that he also meets the common law test for that term.”

a research university and its graduate students is not fundamentally an economic one but an educational one.”⁴³

There is a strong argument that *Brown University* is entirely distinguishable from *Northwestern* because the football players appear to have a relationship with the school that is not fundamentally educational. However, it could be argued that similar to the situation in *Brown University*, the first prerequisite of being a student-athlete is being a student,⁴⁴ and therefore, student-athletes should be considered primarily students attending college for educational purposes. The determining factor in the Board’s decision on review is whether the Board will consider the reasoning in *Brown University* or *Northwestern* to be more persuasive. There is certainly existing precedent to suggest a sports scholarship tender agreement can serve as a contract of hire between a student-athlete and a university.⁴⁵

The football players in the *Northwestern* case are not disputing the fact they are students; however, they assert they are not primarily students. On a related topic, at one point in time janitors and professors could not unionize because the NLRA did not apply to universities, as universities were not a commercial enterprise.⁴⁶ A cursory glance at the massive revenues brought in by men’s basketball and football quickly dispels the notion those sports are not commercial enterprises, so it should follow that athletes in those sports should be able to unionize in the near future, because their relationship is primarily economic and commercial, not educational.

⁴³ *Id.* at 486.

⁴⁴ *Id.* at 488.

⁴⁵ See *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172-73 (Cal. Ct. App. 1963) (finding a contract of employment between a football player and a state college).

⁴⁶ *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679-80 (U.S. 1980) (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-505 (1979). (stating “There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not ‘affect commerce.’”)

2) Student-Athletes are Subject to their Respective School's Control

The second element that needs to be show under the common law definition of employee is one of the easier ones for student-athletes to satisfy, and it highlights why student-athletes ought to be given a voice to bargain with the NCAA. Student-athletes often have their days planned out entirely for them, from as early as 5:45 a.m. to 10:30 p.m.⁴⁷ Coaches maintain extensive control over student-athletes, including restrictions on living arrangements, outside employment, off campus travel, social medial and internet use, and consumption of alcohol.⁴⁸ With so many rules and regulations, student-athletes must toe the line to ensure they are not in danger of losing their scholarship. The extensive control exercised by universities and the prioritizing of athletics over academics demonstrate the fact that students are not in school primarily for their education; rather they are there to compete in their respective sports.

It seems fairly evident even at a cursory glance at the schedule of a student-athlete that they are subject to the extensive control of the universities and their sports teams. Professors McCormick state “Indeed, employee-athletes are subject to more control by their universities than is any other employee or group of employees at their institutions.”⁴⁹ Not only are student-athletes required to report to weightlifting as early as 5:30 in the morning, but arriving late for practice is not permitted and is often punished.⁵⁰ Multiple late arrivals or breaches of the rigorous team rules can result in a player being kicked off the team and having his scholarship taken away.⁵¹ In addition to the control the coaches exert over the student-athletes in monitoring their

⁴⁷ *Northwestern*, at 15.

⁴⁸ *Id.* at 16.

⁴⁹ McCormick, at FN 123 “What other university employee is subject to such control by his supervisor that he must lift weights at 5:30 a.m., run in the summer sun, and seek permission to leave campus during summertime off hours, or risk termination? See Part III.A.1-2.”

⁵⁰ *Id.* at 100.

⁵¹ *Id.*

daily practice activities, meals, and workouts, the NCAA requires each player take a full time course load of at least 12 credit hours each semester.⁵² Probably the time of year that exemplifies the most extreme amount of control over the student-athletes playing football is during the preseason camp in August, just before the start of the season.⁵³ The Professors McCormick gained the following insight after speaking to several student-athletes anonymously:

During this most intensive training period, players are effectively "on duty" from 6:30 a.m. to 10:00 p.m. six days a week. They must participate in three arduous full-contact practices every two days. The physical regimen during this pre-season period is legendary. Designed to harden the players for the rigors of the upcoming season, this boot-camp-like experience includes weightlifting, running, meetings, and group meals and is universally considered to be exhausting and brutal.

It is impossible to think of another job that demands so much of its employees – likely because employees in other jobs are actually recognized as such, and permitted to bargain collectively for better treatment and safer conditions. The extensive control universities exert over student-athletes highlights the need for collective bargaining so the rights of student-athletes are properly respected and protected.

3) Student-Athletes Compete in Return for Payment

The third and final prong under the common law definition of an employee may present the largest hurdle Kain Colter and CAPA face on review of the full Board. Employees must perform their work in return for payment, and *Brown University* held that graduate assistants' compensation was not pay for services performed, but rather financial aid to attend the university.⁵⁴ Furthermore, *Brown University* held that the compensation given to the students is financial aid when it is the same as that received by other students not required to teach or

⁵² *Id.* at 101.

⁵³ *Id.* at 103.

⁵⁴ *Id.* at 20 (citing *Brown University* at 488-89).

research and not tied to the quality of their work.⁵⁵ This is readily distinguishable from the situations faced by student-athletes, however, because student-athletes can have their scholarships immediately cancelled if they cease to play their sports or violate any sort of team rules. Thus, it is abundantly clear that the scholarship is tied to their athletics participation, unlike other students, and can be classified as payment, rather than financial aid. This is going to be a tightly contested issue in the Board's review, and appears to be the toughest prong of the common law definition of employee to satisfy.

The heart of the Board's review will likely center on two conclusions reached by the NLRB Regional Director. First, the Regional Director reached the conclusion that scholarship football players are not primarily students, which many find shocking, given their very title as "student-athletes."⁵⁶ While it seems like a revolutionary concept to assert that student-athletes attending college required to maintain a certain grade point average are not primarily students, this conclusion makes sense upon careful consideration of what the life of a student-athlete looks like on a regular basis. Student-athletes spend a significantly larger portion of time performing their athletic duties than their academic obligations.

The second controversial holding that will be pivotal in the Board's review is how the NLRB Regional Director distinguished the *Brown University* test by holding that scholarship compensation is not financial aid. This debate can best be explained by comparing the scholarships of student-athletes to the scholarships of non-student-athletes.⁵⁷ Ever since the 1956 NCAA Convention, schools have been permitted to pay for all the educational expenses of student-athletes based on their athletic ability alone without any consideration of their academic

⁵⁵ *Id.*

⁵⁶ *Id.* at 18.

⁵⁷ *Id.* at 20.

potential.⁵⁸ Thus, it is clear that the scholarships of student-athletes are not based on consideration of academic potential, like the general student body scholarships.

If the Board plans on reversing the Regional Director's decision and following the holding of *Brown University*, then it will likely be for one of the two reasons listed above. However, there are some people who suggest the current majority on the Board favor reconsidering and reversing *Brown University*.⁵⁹ To wit, in 2012 a Board majority granted review in cases concerning graduate student assistants at New York University and Polytechnic Institute of New York University, and invited amici briefs for the express purpose of aiding the Board in reconsidering *Brown University*.⁶⁰

The NLRB review will hinge on whether *Brown University* applies. If the Board affirms that student-athletes should be considered employees, which is the correct holding based on the applicable case law, then the impact will be felt across the NCAA. Northwestern players have already voted on whether they would be represented by collective bargaining on April 25, 2014, but the NLRB said the results of the vote will not be made public until that review of the Regional Director's decision is finished. At this time, the review is still unfinished, but the full NLRB could hand down a decision any day now. The following sections shall discuss the ramifications of either affirming or reversing the Regional Director's decision, and assert that an affirmation is the correct decision, consistent with prior case law and in the best interests of protecting the student-athletes involved.

⁵⁸ See McCormick at 111-112, stating "Once universities began compensating students solely for their athletic services, they fulfilled the compensation requirement of the common law test, 168Link to the text of the note thereby propagating the employment relation with their athletes."

⁵⁹ Practical Law Labor & Employment, *Expert Q&A with Brian Hayes on the NLRB's Northwestern University Decision and Pending Football Player Union Election*, Practical Law (April 8, 2014), available at <http://us.practicallaw.com/6-564-0603>

⁶⁰ *Id.* citing *N.Y. Univ.*, No. 02-RC-023481, 2012 WL 2366171 (N.L.R.B.) (June 22, 2012) and *No. Polytechnic Inst. of N.Y. Univ.*, 29-RC-012054, 2012 WL 2366170 (N.L.R.B.) (June 22, 2012))

IV. Ramifications of the *Northwestern* Case

Because the NLRB only has statutory jurisdiction over private sector employers, and consequently private colleges like Northwestern, many people believe the *Northwestern* case will be limited in impact. Fifty four of the sixty two schools in the “Power Five” conferences are public universities, and collective bargaining in the context of public universities is governed by state public-sector collective bargaining laws. So the *Northwestern* case can serve as precedent only for other private universities, and even the holding as it applies to some private universities such as religious schools might be limited by the case of *NLRB v. Catholic Bishop of Chi.*, where teachers at Catholic high schools and religious schools were excluded from the jurisdiction of the NLRA on First Amendment grounds.⁶¹

State public-sector collective bargaining laws vary greatly from state to state.⁶² Some states may have laws that are favorable to collective bargaining in a public university setting; however, some states have laws that are extremely unfavorable.⁶³ Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, West Virginia, and Wyoming all do not permit collective bargaining by any public employees,⁶⁴ and therefore, it follows that student-athletes of public universities in these states might not be afforded collective bargaining privileges at all. There are also some states which permit collective bargaining only for some specific public employees who work in public safety.⁶⁵

⁶¹*NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504-07 (1979) (holding “Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”)

⁶² Nicholas Fram and T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, Buffalo Law Review Vol. 60, 1003 (2012)

⁶³ *Id.*

⁶⁴ *Id.* at 1068.

⁶⁵ *Id.*

However, there are cases to suggest student-athletes at public universities could bargain for protections under state collective bargaining laws. In Florida, the case of *Utd. Faculty of Fla. v. Bd. Of Regents* was factually similar to *Brown University*, but it involved public school graduate assistants instead.⁶⁶ Initially, the Florida Public Employee Relations Commission allowed public school graduate assistants to unionize, but then the legislature amended the public bargaining statute to exclude graduate students from its definition of public employee.⁶⁷ The Florida Court of Appeals held that this violated the Florida Constitution, which provided that the rights of employees to bargain collectively shall not be denied or abridged.⁶⁸ The court held the graduate assistants were employees, and stated the following:

It cannot be doubted that graduate assistants are “students in institutions of higher learning,” they are all university students pursuing advanced degrees. But that is not all they are. They all perform work for the various universities operated by the board, their work is of benefit to the universities for which it is performed, the work is performed subject to the supervision and control of professors who are employees of the several universities, and the work is performed in exchange for the payment of money by the board to the graduate assistants who perform the work. A more classic example of an employer-employee relationship can hardly be imagined.

Based on the above language, it appears that the public collective bargaining definition of employee is even broader than the definition used in private universities as set forth by the NLRB in *Brown University*. In jurisdictions like Florida, public university student-athletes would actually have an easier time forming collective bargaining units. Still, with a fair number of states who do not permit collective bargaining by public employees whatsoever as a blanket rule, and many more limiting the ability of collective bargaining to certain categories, it is a valid concern that public universities might lag behind private ones in collective bargaining. The

⁶⁶ *Utd. Faculty of Fla. V. Bd. Of Regents*, 417 So. 2d 1055 (1982)

⁶⁷ Fram & Frampton at 1068.

⁶⁸ *Id.*

varied and inconsistent laws from state to state may prompt other reform or legislation, or some have argued there are other routes that public university student-athletes can take, such as asserting they should be considered employees under laws protecting individual rights.⁶⁹

Many recent legal actions and decisions indicate the NCAA is on the brink of major reform and restructuring. In *O'Bannon v. NCAA*, the Ninth Circuit ruled that student-athletes can be compensated for their likenesses, which seems like an ominous sign for the NCAA's amateurism model.⁷⁰ The original complaint in *O'Bannon* was filed as an antitrust complaint against the NCAA in the U.S. District Court for the Northern District of California.⁷¹ The complaint alleged that the NCAA and its members violated Section 1 of the Sherman Anti-Trust Act by “conspiring to fix the prices they received for the use and sale of former student-athletes images, likenesses and/or names at zero dollars.” In a surprising decision, the court held student-athletes can be compensated for their likenesses, and thus shook the foundations of the notion that college athletics system is strictly an amateur model.

The discussion of amateurism is for another day, however, and is beyond the premise of this paper. The United States Supreme Court in *NCAA v. Board of Regents*, even recognized how the “NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports... [and] needs ample latitude to play that role.”⁷²

There is no question that these cases demonstrate how the amateur status claimed by the NCAA is possibly becoming outdated and unrepresentative of the college athletic industry. The issue of compensating collegiate student-athletes and revising the “no pay” provisions of the

⁶⁹ Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. Miami L. Rev. 65, (2014).

⁷⁰ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014)

⁷¹ *Id.*

⁷² *NCAA v. Board of Regents*, 468 US 85, 101 (U.S. 1984)

NCAA is an entirely different matter from unionization, however, and although many student-athletes would desire monetary compensation, far more are simply looking for added protections of medical coverage and cost of living stipends via of collective bargaining.

The issue of unionization should not be confused with the issue of professionalization and the debate over amateurism in the NCAA; they are seeking to achieve two very distinct goals. When courts like the Ninth Circuit in the *O'Bannon* case permit student-athletes to recover compensation for use of their likeness, it only serves to solidify the fact that student-athletes have an entire host of rights that are not being protected under the current NCAA system. Legal recognition of college athletes as “employees” might actually serve to promote the values of amateurism after full considerations of what unions ultimately do.⁷³ As Fram and Frampton state in their excellent Buffalo Law Review note,

On one view, unions’ *raison d’être* is to win monopoly wage gains for their members—a purpose that is oddly out of place in the context of “amateur” competition. An alternative approach, however, recasts the debate in political, rather than strictly economic, terms. “industrial democracy” understanding of collective bargaining, the role of the union “is to **democratize the employment relationship by balancing power, providing employees a voice in the determination of the terms and conditions of employment, and insuring that due process of law is followed in [the workplace context].**”⁷⁴ (emphasis added)

Amateurism is fundamentally about fair play, democratic participation and giving a voice to all participants. The NCAA claims it is organized for the benefit and recreation of the student-athletes playing the sports, but how it operates thoroughly deprives student-athletes of the ability to participate in the decisions that govern their lives.⁷⁵ Unionization could remedy this imbalance of power.

⁷³ Fram & Frampton, at 1010.

⁷⁴ *Id.* at 1072.

⁷⁵ *Id.* at 1073.

As far as what a union of amateur college athletes could seek to achieve in collective bargaining,, players could seek a reduced work load, limits on the number of games played during exam periods, additional time off during the holidays, and a stricter enforcement of the NCAA’s “20-hour limit” rule, so practice times are limited to an appropriate and reasonable length.⁷⁶ Additionally, admirable goals for collective bargaining could include a stipend that more accurately reflects the true cost of attending college, better health insurance, guaranteed scholarships that are irrevocable regardless of injury or performance, access to a full range of majors and programs, more time to pursue academic coursework, or healthcare coverage and paid medical expenses for sports related injuries.

In response to the turbulent atmosphere surrounding it, the NCAA has recently passed legislation that includes a “cost of attendance” measure to supplement student-athletes’ scholarships with dollars to help pay for housing, food, and other basic costs student-athletes accrue while attending college.⁷⁷ This is a small step taken by the NCAA, and only applicable to the largest schools that are members of the “Power Five” conferences,⁷⁸ but it is only a matter of time before there are heightened protections for NCAA student-athletes, and the *Northwestern* Case is at the very heart of driving this change. It is unfortunate that the NCAA has been so reactionary in its reform, and only responded with this cost of attendance stipend after heightened media scrutiny, but at least it was a positive step, even if it was more for public relations than actual reform. This new stipend does not require any school to increase aid to the full costs of attendance, but rather just creates an option. Ideally, some sort of collective bargaining system could be a much more efficient and less wasteful way to apply constant

⁷⁶ *Id.* at 1073.

⁷⁷ Mitch Sherman, *Full cost of attendance bill passes 79-1*, ESPN, (January 18, 2015), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins

⁷⁸ *Id.*

pressure on the NCAA to reform. The slow and costly litigation that is currently the driving force of change is cumbersome and exhausting.

Ultimately, what is important is giving athletes a voice to decide what they want rather than the NCAA deciding what it thinks athletes want. The paternalistic current NCAA model is outdated, and unionization for student-athletes in revenue generating sports treats the student-athletes with greater human dignity and a proper appreciation of what they have worked so hard to produce and generate for their respective schools.

As with any major shift in an area of law, there would be a host of uncertainties if NCAA student-athletes in revenue generating sports were granted the right to collective bargaining. For example, there are policy arguments to consider such as whether the NCAA would have adequate resources, or whether this would affect other non-revenue producing programs that rely upon the sports like football and basketball to supply their scholarship funds. However, this is technically irrelevant for the purposes of determining employee status, as it focuses on the wrong flow of money. It may make for a policy argument, but ultimately the decision should come down to the relationship between the university and its student-athletes, as spelled out by the three common law elements of the employee definition in sections III(1), III(2), and III(3) of this paper.

It has also been mentioned previously that allowing student-athletes in revenue generating sports to bargain collectively could reduce the amount of money available to non-revenue producing sports. It certainly would pose new dilemmas to Northwestern and other schools if they suddenly were held accountable to provide higher protections, cost of living stipends, and other benefits to their men's football and basketball players. The schools may even

encounter difficulties in sustaining a proportionate number of men's and women's sports to remain in compliance with Title IX of the Educational Amendments of 1972. However, the heart of the matter is whether student-athletes can be considered "employees" under section 2(3) of the National Labor Relations Act. If they are given employee status, then this determination is independent of the considerations of the other programs funded by the revenues brought in by the football and basketball teams. The NCAA and its schools would need to address how they could balance protecting their revenue producing student-athletes while still funding other non-revenue producing athletics.

Some have asserted that the sad reality is that the less popular sports will suffer a reduced number of scholarships, but the free market can allow universities to determine what sports add value to the university.⁷⁹ This pragmatic view asserts if does not add value, then the number of scholarships should be reduced and players will have to pay their own way.⁸⁰ This seems like a harsh result beyond just the necessary collateral damage of a new college sports model and that is why this paper is arguing only for some heightened protections for student-athletes via collective bargaining and not a complete overhaul of the NCAA amateurism model. There needs to be some ability for non-revenue producing sports to exist, otherwise women's sports and the vast majority of men's collegiate athletics would cease to exist, and there would be serious Title IX problems. However, the bottom line is if student-athletes are found to be employees under the NLRA, then there are certain rights they are entitled to, and schools cannot abridge these rights just because they have been doing so for a lengthy period of time. It may be an adjustment, but it must be made if justice so requires.

⁷⁹ Zach Gorwitz, *Money Madness: Why and How NCAA Athletes Should Be Paid*, Duke Political Review, (October 1, 2013), <http://dukepoliticalreview.org/money-madness-why-and-how-ncaa-athletes-should-be-paid/>

⁸⁰ *Id.*

Professors Robert and Amy McCormick again astutely observe that the reverberations of student-athletes as employees would dramatically affect the distribution of college athletics funds.⁸¹ The exorbitant salaries paid to coaches and spent on facilities suggest that the funds are available to adequately protect student-athletes in revenue producing sports and still be in compliance with Title IX by funding non-revenue producing sports. However, as with any major change, it would be impossible to project with certainty what the fallout would be from treating student-athletes as employees. This paper focuses on the right to collective bargaining, and does not purport to be a complete discussion of the Title IX ramifications, but Mark Edelman suggests Title IX may just be a red herring, as it currently allows for disparate treatment of men's and women's sports because of the revenue produced.⁸² Furthermore, Title IX expert and Drexel professor, Ellen J. Staurowsky, has indicated if athletes are indeed "employees" then Title IX may not apply at all, as it refers to access to education.⁸³

Marc Edelman further argues that "despite the NCAA's assertions to the contrary, it is indeed possible for the NCAA and its member schools to operate at a profit even after compensating student-athletes for the use of their likenesses. What would be required, however, would be for the NCAA to operate as a leaner, more efficient trade organization, and for NCAA member colleges to begin paying their presidents, athletic directors, and coaches at salary rates

⁸¹ McCormick, at 80 FN 34, stating "Acceptance of our thesis would also have important practical implications. For example, given the dependence of all other collegiate sports upon the revenue generated by football and men's basketball, how would these other sports be funded? How would universities comply with other laws, such as Title IX, 20 U.S.C. §§ 1681–1688 (2000), requiring equal treatment of women's sports? The practical reverberations of our thesis are many, and plainly beyond the scope of this Article. It seems fair to say, however, that most involve a reslicing of the rich pie of college athletics."

⁸² Marc Edelman, *When It Comes To Paying College Athletes, Title IX Is Just A Red Herring*, Forbes, (February 4, 2014), available at <http://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/>

⁸³ Jeré Longman, *Amid Cheers, Union Bid Stirs Concern for Women*, NY Times, (April 3, 2014), available at http://www.nytimes.com/2014/04/04/sports/impact-of-northwestern-ruling-on-womens-sports-is-uncertain.html?_r=0

that are more reflective of the free market. Much like many other monopolist trade associations, the NCAA currently operates inefficiently.”⁸⁴

While it is not necessarily going to be easy to prove the NCAA can operate at a profit and be able to fund non-revenue producing sports, there is a lot to be said about the current way in which the large NCAA revenues are distributed. In forty of the fifty U.S. states, the highest paid public official is currently the head coach of a state university's football or men's basketball team.⁸⁵ College football coaches like Nick Saban at Alabama University and Mark Dantonio at Michigan State University reportedly earn annual salaries over \$7.9 million and \$5.6 million, respectively.⁸⁶ These coaches are only able to be paid these stratospheric salaries because universities are not required to spend much at all on the welfare of their student-athletes. If Edelman is correct in his assertion that the NCAA could even survive and operate at a profit after compensating student-athletes are fair market value, then it follows that there at least should be adequate financial power to offer heightened protections for student-athletes such as guaranteed scholarships, better medical insurance coverage, and a cost of living stipend.

The current system really is a form of wage theft in the fact that it takes the excess profits generated by revenue producing sports – men’s basketball and football, usually – and transfers them to non-revenue producing sports. It is not fair to require men’s basketball and football players to give up on any heightened protections that additional finances could provide them in order to fund another endeavor that the general public does not pay as much to come and

⁸⁴ Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 Or. L. Rev. 1019 (2014).

⁸⁵ *Id.* (citing Josephine (Jo) R. Potuto, William H. Lyons & Kevin N. Rask, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 893 (2014).)

⁸⁶ Steve Berkowitz, Jodi Upton, Christopher Schnaars and Sean Dougherty, *2014 NCAAF Coaches Salaries*, USA Today, (November 19, 2014), <http://sports.usatoday.com/ncaa/salaries/>

support. This redistribution of resources is particularly troublesome in light of the fact that a large percentage of men's basketball and football players are racial minorities, and under the current system, the value they generate is being used to compensate primarily Caucasian coaches and other non-revenue producing sports with less racial minority participation in general.⁸⁷

It is not proper to restrict the size of grant in aid compensation available to these often underprivileged athletes to transfer to other places. In some circumstances, this even shifts the cost on the public taxpayer, as 65% of UCLA football players receive Pell grants to attend college.⁸⁸ If the players were granted a higher share of the revenue they generate to help pay their way in college, then the Pell grant funds could be allocated elsewhere. Presently, the student-athletes in revenue producing sports are being forced to pay for something no one else is willing to pay for. If it is a priority to the school to have this sport, then the school must find funding in a way that does not deprive its revenue producing student-athletes of basic protections.

Unionization might not be possible for non-revenue producing athletes, even those who presently receive grant in aid scholarship money, because in addition to meeting to common law three requirements in the employee definition, the student-athletes would have to meet the *Brown University* standard and show they are not primarily students. It would be much more difficult for a student-athlete in a non-revenue producing sport to assert his or her relationship to the university is primarily an economic one and not educational one. When these non-revenue producing student-athletes actually cost the schools money, it is difficult to argue their

⁸⁷ Gary Becker, *The NCAA as a Powerful Cartel*, The Becker-Posner Blog (April 3, 2011), stating "A large fraction of the Division I players in basketball and football, the two big money sports, are recruited from poor families; many of them are African-Americans from inner cities and rural areas. Every restriction on the size of scholarships that can be given to athletes in these sports usually takes money away from poor athletes and their families, and in effect transfers these resources to richer students in the form of lower tuition and cheaper tickets for games..."

⁸⁸ Andy Schwartz, *Hearing on Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes*, Expanded Written Testimony of Andy Schwarz Before the Committee on Education and the Workforce (May 8, 2014).

relationship is primarily an economic or commercial one with the school. It may be that scholarships for student-athletes in non-revenue producing sports will need to be cut, but the current system raises the question of why are the student-athletes currently given scholarships to play a sport when that sport does not bring in any revenue. The reality is very few sports actually generate revenue for their universities, and the athletes who work so hard in those sports ought to be adequately protected.

It does seem unfair that student-athletes in non-revenue producing sports, walk-ons, and division III athletes all might be excluded from the appropriate collective bargaining unit when each of the aforementioned categories works just as hard as revenue producing student-athletes for the schools. However, that appears to be what the state of the law is currently under *Brown University* and its economic realities test requiring an economic relationship. Hopefully the gains made by student-athletes permitted to bargain collectively can be an important stepping stone and lead to widespread NCAA reform for all student-athletes. The current state of the law may not present an ideal solution, but it is still groundbreaking and progressive.

There are also potential worker's compensation ramifications of recognizing student-athletes as employees.⁸⁹ In 1953, in *University of Denver v. Nemeth*,⁹⁰ a student-athlete was injured, and found to be an employee for the purposes of workers' compensation from the university. In response, the NCAA Executive Director Walter Byers fought hard to emphasize the identity of student-athletes as students, rather than athletes, so they would not be characterized as employees. Byers wrote on the topic:

[The] threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts. [To address that threat, w]e crafted the

⁸⁹ *Waldrep v. Texas Employers Insurance Association*, 21 S.W. 3d 692, 707 (Tex. Ct. App. 2000)

⁹⁰ 257 P.2d 423 (Colo. 1953).

term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros.⁹¹

As Professors Robert and Amy McCormick observed, the response by the NCAA focused so intensely on requiring the use of the phrase “student-athlete” to discourage those student-athletes from ever being seen as employees instead of students, and that is why the NCAA is facing these issues currently.⁹² The NCAA is well-aware of what duties would be owed in an employment relationship, and therefore is perfectly content to maintain the status quo where a minimal amount of money actually is directed towards the student-athletes. In a related case of *Waldrep v. Texas Employers Insurance Association*, the court held that an injured athlete was not an employee for the purposes of workers’ compensation.⁹³ However, it is interesting to note the court observed the injury took place in 1976, and it readily admitted that the NCAA has changed drastically since that time and the outcome of the case might not be the same if the injury occurred today.⁹⁴

Other unanswered questions include the whether federal workplace safety rules apply to these student-athletes who meet the definition of employees. Also, there is an issue of whether the value of their scholarships should be taxed as income, and if federal and state wage and hour laws should apply to the student-athletes. Because state workers' compensation laws are often considered the exclusive remedy for injured employees, it could possible mean that these statutes would provide the exclusive remedy for student-athletes. There are a whole host of unanswered questions that the impact of the *Northwestern* case poses going forward such as whether student-

⁹¹ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete; the College Athlete as Employee*, 81 Wash. L. Rev. 71, 83-84 (2006).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

athletes should be included in institution-wide employee benefit plans, and if state and federal anti-discrimination statutes apply.⁹⁵ The answers to the above are not yet clear, but if the trend towards recognizing the unique position NCAA student-athletes are in continues, then it will only be a matter of time before the NCAA, the court system, and legislatures are required to address the above issues.

V. Alternatives to Collective Bargaining

Even though collective bargaining could have an enormous impact on protections for NCAA student-athletes, it is currently limited in its impact to student-athletes of revenue generating sports at private universities under the NLRB. There are thousands of other athletes who work just as hard who are either not on scholarship, not in a revenue producing sport, or not at a school that is either private or in a state that allows for public employee collective bargaining. There is clearly a problem when student-athletes are not being adequately protected, but it is a fair question to ask whether or not collective bargaining is the proper answer.

It is difficult to imagine what an alternative model of the NCAA looks like, mostly because the NCAA is a hybrid model currently – a system that has its roots in amateurism, but is becoming increasingly professionalized and highly lucrative. The NCAA model is on an unsustainable trajectory and so it has two options going forward – become a more professional system or revert back to a true amateurism model.

Given the rampant growth in popularity and revenues, it is doubtful the NCAA would ever consider returning to a primarily educational and amateur model. There is simply too much money on the table. However, the alternative is a more professionalized model, which may look

⁹⁵ Practical Law Labor & Employment, *Expert Q&A with Brian Hayes on the NLRB's Northwestern University Decision and Pending Football Player Union Election*, Practical Law (April 8, 2014), <http://us.practicallaw.com/6-564-0603>

more like a minor league of sorts for professional sports. Because amateurism and the concept of cheering one's alma mater on in college athletics are cited as major reasons why the NCAA has had such success, it seems like an overly professionalized system would cheapen the experience. The athletes would have a much more tenuous connection to the university. Compensating student-athletes at a fair market value and overly professionalizing the NCAA may be too drastic a change for many to stomach.

However, because the NCAA drags its feet at reform and has been so slow and reactionary in its approach to solving the current issues it faces, something drastic might be necessary. The current system encourages costly litigation to win certain rights from the NCAA, as evidence by the *O'Bannon* and *Northwestern* cases. Other alternatives include legislation or voluntary reform by the NCAA, but this seems like it would be a slow process that is not likely to happen in the immediate future. Collective bargaining could be a faster, lower cost, and more effective method of applying pressure for reform on the NCAA.

A complete destruction of the amateur model should be avoided if possible, because of the sheer uncertainty of what system would take its place. Collective bargaining provides a workable alternative that can preserve some of the treasured values of the NCAA, while ensuring that the problems and concerns of student-athletes are adequately voiced and able to be addressed. What collective bargaining could do is allow the student-athletes be heard as to what their preferences, goals, and desires are, without completely destroying the current NCAA model. For too long, the NCAA has had the only opinion that matters, and if the playing field is leveled via collective bargaining, then perhaps college athletics could continue on as they have for so many years without too radical of an overhaul. Some may not like the conclusion student-athletes are employees, but it is an inescapable conclusion under the law.

VI. Conclusion

NCAA athletics have changed almost beyond recognition over the past few decades. Given the changed circumstances and changed relationship between universities and their student-athletes, it seems appropriate that the athletes in revenue producing sports be considered employees for the purposes of collective bargaining. There is a definite imbalance of time and emphasis devoted to being a “student” versus being an “athlete,” and the status of those student-athletes under the law should reflect this.

As this paper has demonstrated, college athletes are being overworked under the most strenuous of conditions and are inadequate provided for and protected by the scholarships. After examining the true relationship between a university and its student-athletes, it is abundantly clear the student-athletes (1) perform services for the universities under a contract of hire, (2) are subject to the university’s control or right of control, and (3) in return for payment in the form of grant-in-aid scholarships; therefore, student-athletes are employees as a matter of law. Under *Brown University*, the relationship of employees to their universities in an educational setting cannot be primarily educational. Therefore, unfortunately only grant-in-aid athletes in revenue producing sports have a sufficiently economic relationship to be considered employees under the current state of the law. Because they are employees, they “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing...”⁹⁶

Recognizing student-athletes as employees may not effectuate any change at all. It could be the Northwestern football players vote not to unionize, or their collective bargaining power might not yield any greater rights or protections. However, it is just as possible that the cases

⁹⁶ 29 USC § 157

coming before the NCAA might result in fundamental widespread changes and reform in the NCAA model. It is impossible to ascertain the future with absolute certainty, but the student-athletes deserve at the very least a chance to be heard. The NCAA has flourished off of the hard work of countless student-athletes, and it seems right to give the student-athletes a voice via collective bargaining to better protect their interests. Recognizing what function student-athletes truly serve in their capacities at universities could help protect their individual rights and ensure they are treated as fair as possible under the circumstances and given a more level playing field when dealing with the NCAA.